Filed 12/19/08 P. v. Romero CA2/5

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. LUIS ALBERTO ROMERO et al., Defendants and Appellants.	B203217 (Los Angeles County Super. Ct. No. PA053247)

APPEAL from a judgment of the Superior Court of Los Angeles County, Burt Pines, Judge. Affirmed with modifications.

Charlotte E. Costan, under appointment by the Court of Appeal, for Defendant and Appellant Luis Alberto Romero.

Andrew Reed Flier, under appointment by the Court of Appeal, for Defendant and Appellant Hector Manuel Romero.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Michael R. Johnsen and Mary Sanchez, Deputy Attorneys General, for Plaintiff and Respondent.

I. INTRODUCTION

Defendants, Luis Alberto Romero and Hector Manuel Romero,[1] appeal from their convictions for first degree murder (Pen. Code,[2] § 187, subd. (a)) and Luis's conviction for firearm possession by a felon. (§ 12021, subd. (a)(1).) They also appeal from the jurors' findings that Luis personally used a firearm in the commission of the murder (§§ 12022.53, subds. (b), (c), (d), and (e)(1)) and the crimes were committed for the benefit of a criminal street gang. (§ 186.22, subd. (b)(1)(C)). They raise multiple contentions. We affirm with modifications.

II. FACTUAL BACKGROUND

We view the evidence in a light most favorable to the judgment. (*Jackson v. Virginia* (1979) 443 U.S. 307, 319; *People v. Elliot* (2005) 37 Cal.4th 453, 466; *Taylor v. Stainer* (9th Cir. 1994) 31 F.3d 907, 908-909.) At approximately 1:30 or 2 p.m. on November 24, 2004, S.A. was walking with Yaniv Bashian on Tobias Street. Mr. Bashian was a member of the local gang. S.A. and Mr. Bashian were dating. S.A. testified she was still a member of the local gang. But she said she did not "actively hang out" with the local gang. She characterized her relationship with the local gang as follows, "I just don't associate with them anymore." S.A. did not want to testify because gang members do not testify against one another even if they are in rival gangs. At the time of trial, S.A. had moved out of the local gang area.

As S.A. and Mr. Bashian walked on Tobias Street, he stopped briefly to speak to someone. Soon thereafter, a dark gray Yukon truck drove slowly past. S.A. saw

---

1 For purposes of clarity each defendant will hereafter be referred to by his first name.

individuals looking out the passenger side window. S.A. "threw [her] gang sign" at those in the Yukon to let them know she was from the local gang. Thereafter, the Yukon turned right and returned in the direction from which it had come. S.A. and Mr. Bashian ran and took cover behind a parked red car. S.A. believed those inside the truck would shoot at them. When S.A. no longer heard the truck's loud muffler, she and Mr. Bashian stood up. As they did so, Hector said, "What did you say, Ese?" Mr. Bashian responded with the name of the local gang. Hector was in the driver's seat. The driver's window was completely open. Hector was holding what appeared to be a nine-millimeter semiautomatic handgun. The front and back passengers got out of the truck. The front passenger, Luis, came behind S.A. and held a gun to her head. The back passenger began fighting with Mr. Bashian. That individual hit Mr. Bashian in the head with a gun. Mr. Bashian was shot when he began to run. After the first shot, Mr. Bashian turned around. Mr. Bashian was then shot in the chest. When the two individuals began to walk away, S.A. went to where Mr. Bashian had fallen face down. However, the assailants returned. Luis shot Mr. Bashian in the back again. Mr. Bashian died as a result of multiple gunshot wounds.

S.A. spoke with Detective Orlando Martinez later that day. S.A. described the Yukon and gave Detective Martinez part of the license plate number. S.A. told Detective Martinez that the driver was "skinny," wore a black shirt, and was bald. S.A. saw the Yukon a few weeks later when it was parked near the Van Nuys courthouse. S.A. realized it was the same Yukon based upon the "Dayton" rims, the color of the truck, the tinted windows, and the license plate. S.A. wrote down the license plate number of the Yukon. S.A. gave the information to the detectives when they visited her on December 21, 2004. S.A. testified at the preliminary hearing in this case. S.A was positive about her identification of Hector and Luis.

---

2 All further statutory references are to the Penal Code unless otherwise indicated.

On December 21, 2004, S.A. was shown photographs by Detective David Holmes. S.A. was unable to identify anyone from the photos. On October 10, 2005, a detective came to S.A.'s home. The detective showed S.A. additional photographic lineups. S.A was again unable to identify anyone. S.A. explained at trial that she had been looking for the third individual who first shot Mr. Bashian. On October 13, 2005, Detective Holmes asked S.A. to look at the photographs again. S.A. was able to identify both Luis and Hector from the photographs. S.A. wrote that she was certain that No. 2, in the photo display, Luis, was the driver. However, at the preliminary hearing on April 26, 2006, S.A. identified Luis as the individual who stood behind her and shot at Mr. Bashian. This was already after Mr. Bashian was on the ground. At trial, S.A. said that she had been mistaken in her identification of the driver and that Hector was the driver. S.A. acknowledged that she had reversed the roles of those she identified at trial from her original identification with the police. S.A. was certain of her identifications at trial because she could not forget their faces and seeing them in person was better than seeing them in a photograph.

Alex Valdez was delivering mail at approximately 2:20 p.m. on November 24, 2004. While in the back of his postal truck, Mr. Valdez thought he heard firecrackers or M-80 fireworks. Mr. Valdez saw a silver or gray sports utility vehicle speeding southbound on Tobias Street. Mr. Valdez believed the truck could have been a Chevrolet, General Motors, Suburban, or Yukon. A detective interviewed Mr. Valdez on December 29, 2004. Mr. Valdez was shown a photograph of a sports utility vehicle. Mr. Valdez indicated it did not look like the truck he saw on November 24, 2004. However, at trial, Mr. Valdez believed the truck shown in exhibit No. 4 was similar to the one he saw on November 24, 2004.

S.L. was washing dishes in her apartment on Tobias Street at 2:20 p.m. on November 24, 2004. S.L. heard a car slam on its brakes. Seconds later, S.L. heard approximately four shots. When S.L. looked out her window, she saw an individual get out of a truck resembling an Expedition. Another individual got inside the truck on the

passenger side. S.L. initially testified that she saw Luis in the driver's seat of the truck. However, S.L. later identified Luis as the individual who got out of the passenger seat, fired the shots and returned to the truck. S.L. identified Hector as the driver. After the truck sped away, S.L. called the police. S.L. came downstairs and found a man on the ground and a girl crying.

S.L. was interviewed by the police on several occasions. On December 15, 2004, S.L. was shown a "20-pack" photo array. S.L. made no identifications at that time. Detectives again showed S.L. some photographs on December 27, 2004. At that time, S.L. circled some photos. S.L. testified, "[T]hey told me to look at the pictures and see if one of them looked like the person or it was the person." S.L. wrote on the photographic display, '"No. 1 looks like the passenger that got in the car, and No. 137 looks like the driver and No. 5 looks like the driver."' When S.L. was shown exhibit No. 15, she wrote: '"This is the car that was at the crime. I remember it because it is very alike, because of the rims, the color."' On October 13, 2005, detectives again showed S.L. photographs, exhibit No. 16, which she identified as depicting the passenger at trial. On the photographs depicted in exhibit No. 17 at trial, S.L. had written, '"He is the one that looks like the one who drove the car."' In the photo display identified as exhibit No. 19 at trial, S.L. circled the individual in position 3 and wrote, '"The passenger was the one who shot. He was one who exited the car."' S.L. acknowledged that she had not seen anyone shoot a gun on November 24, 2004. S.L. did not feel pressured to make an identification in court.

Gabriel Delgadillo's father, Gabriel Delgadillo Sr.,[3] died in January 2005. Gabriel Jr. saw defendants at his home. Defendants were with Gabriel Sr. on November 24, 2004, and at least three other times. Gabriel Sr. had been a member of a local gang.

---

3 Hereafter, Gabriel Delgadillo will be referred to as either Gabriel Jr. or Gabriel Sr. for purposes of clarification and out of no disrespect.

Another individual, identified only as "Pieddy," was also present on numerous occasions. The person identified only as Pieddy was a member of the same gang as Gabriel Sr. Defendants told Gabriel Jr. that they were members of another local gang. Gabriel Sr. owned the Yukon truck depicted in exhibit No. 4. The truck had the same type of distinctive rims depicted in the photograph. Hector sometimes drove Gabriel Sr.'s Yukon truck. In November 2004, Gabriel Jr. saw Hector and Luis in the Yukon. Hector was driving and Gabriel Sr. was also in the truck at that time. When shown the photographic display marked as exhibit No. 7, Gabriel Jr. identified: Luis as the individual in photo number 7; the person identified only as "Pieddy" in photo No. 8; an individual referred to only as "Weezy" in photo No. 12; Hector in photo No. 15; and Gabriel Sr. in photo No. 11.

Detective John Fleming, upon arriving at the shooting scene, recovered: three .40-caliber Smith and Wesson expended cartridge casings; a live round of ammunition, either 9-millimeter or .40-caliber; and a copper jacket from either a 9-millimeter or .40 caliber bullet. All three casings were fired from the same firearm. In addition, the expended cartridges found at the Tobias Street shooting in this case were fired from the same gun as casings found at a November 9, 2004 shooting on Pierce and Pala Streets.

Detective Martinez assisted two other detectives when they interviewed S.L. on December 27, 2004. Detective Martinez was fluent in Spanish. The two other detectives had experienced difficulty communicating with S.L. previously. S.L. was shown a photo display that had been presented to her previously. Detective Martinez also explained to S.L. that the photographs were the same ones she had previously viewed. Detective Martinez explained that when the photos were previously shown to S.L., the detectives were uncertain if any were familiar to her. Thereafter, S.L. indicated that No. 137 on the 16-pack looked like the driver. When S.L. was shown a series of six photographs, she indicated that the individual depicted as No. 1 looked like the individual who got into the car and the man in the No. 5 position looked like the driver.

Officer Efren Gutierrez worked as a gang enforcement officer for over five years. In that capacity, Officer Gutierrez monitored gangs in the San Fernando Valley and was familiar with the gang to which defendants belonged. Officer Gutierrez maintained records of individual gang members, including their contacts, addresses, automobiles, and other relevant matters. Officer Gutierrez had contacts with gang members during traffic and pedestrian stops, arrests, and custodial encounters. Officer Gutierrez interviewed gang members both in custody and in the community. In addition, other officers shared information within the gang units. Gang members are typically either "jumped" into the gang by being beaten or "courted in" through family members. Hardcore gang members are willing to live and die for the gang. They often have tattoos depicting their loyalty. A "shot caller" is usually a hardcore gang member who is respected and often makes the rules, calls meetings, and the like. An individual gang member gains respect within the gang by committing violent or brazen crimes. The gang to which defendants belonged had approximately 30 members in the year 2000. At the time of trial, the gang consisted of only 13 members. The gang was formed in the 1970's and 1980's and was not a traditional Latino turf gang.

Officer Gutierrez was familiar with the gang's activities, including robberies, an attempted murder of a police officer, carjacking, auto theft, criminal threats, and burglary. Detective Gutierrez knew Luis to be an admitted member of a rival of the local gang. Luis's tattoos depicted symbols of the rival gang. The tattoos serve as advertisements to other gangs to demonstrate their gang loyalty. Officer Gutierrez believed Luis was a member of the rival gang in November 2004. This opinion was based upon: Luis's own admission; his tattoos; and where he typically "hung out." Officer Gutierrez was unfamiliar with Hector. Officer Gutierrez was asked to consider a hypothetical scenario wherein: two members of the local gang are walking on the street; the female local gang member "throws up" the local gang sign to those in a passing automobile; the automobile makes a U-turn, stops next to where the individuals are walking, and the driver yells, "What did you say, Ese?"; thereafter, the male local gang

member says the name of his gang; two people get out of the car and go toward the two local gang members; one holds a gun to the female while the other hits the man in the head with the butt of a gun and then shoots the victim multiple times; the two assailants start to leave but return to shoot the local male gang member in the back; and the driver and one of the persons in the car are members of the rival gang. Officer Gutierrez believed that such a crime would be committed for the benefit of, in association with, and with the intent to promote the rival gang. Moreover, those committing the crime would enjoy elevated status within their gang and enhanced reputation for the gang in the community. The parties stipulated that defendants' gang had engaged in a pattern of criminal activity.

On November 9, 2004, Officer Timothy Wedemeyer arrived at the shooting scene at Pierce and Pala Streets. Officer Wedemeyer noticed seven 9-millimeter Luger and eleven .40-caliber Smith and Wesson spent casings on the street, driveway, and sidewalk areas. On December 3, 2004, Officers Albert Shinfeld and Dave Hunt were on patrol in a marked police car. Officer Shinfeld stopped a gray Yukon truck for a traffic violation. After the officers illuminated the overhead lights and siren, the driver of the Yukon drove into the drive-through lane of a Burger King restaurant. The front passenger immediately jumped out of the Yukon. The passenger, Luis, was holding his waistband in a manner suggesting that he had gun. The officers followed Luis as he ran to the parking lot of the Pacoima Community Center. As Luis ran, he threw a dark object under a red car parked in the parking lot. Luis then jumped over a wall. Luis then jumped back when the patrol car backed up. Luis was taken into custody shortly thereafter. A Beretta 92F fully loaded handgun and a .40-caliber magazine were recovered from under the red car. Later the same day, Officer Shinfeld saw the Yukon at the address of the registered owner, Gabriel Sr. All of the expended casings found at the Pierce and Pala Street shootings were fired from the Beretta handgun which Luis had thrown under the red car.

Dr. Mitchell Eisen, a psychology professor at California State University of Los Angeles, testified concerning eyewitness identification. Dr. Eisen conducted research on

eyewitness identification. Dr. Eisen's research included how well people remember certain events and what types of questioning or procedures might lead to mistaken identification. In preparation for his testimony, Dr. Eisen reviewed police reports, photos, and preliminary hearing transcripts related to this case. Dr. Eisen explained that there are four elements to memory: paying attention; encoding information; storing and organizing information in one's mind; and recalling the information. Dr. Eisen explained that an individual's memory is limited by the attention paid to details and the fact that people take in everything they experience. When people try to recall information they tend to fill in the gaps through reconstruction.

Dr. Eisen noted that individuals respond quite differently to traumatic stress. When tension increases to traumatic stress, it tends to narrow one's focus to the central most important features of the event at the expense of the ability to take in other peripheral information. The individual focuses on the most important elements of the experience to survive and live through it. People also experience a skewed sense of time during traumatic events. Case studies of individuals who have had a gun pointed at them have found the person focuses on the weapon to the exclusion of other factors related to the event. Further Dr. Eisen testified system variables may contaminate the eyewitness evidence. These include: the construction of photo arrays; collection of identifications; instructions given to witnesses before making identifications or feedback afterward; and interviewing techniques.

When two witnesses who perceived the same event speak to one another, they often conform to one another's perceptions. The witnesses might influence one another and mesh their observations. This is referred to as cowitness effects. The witnesses influence one another's memories or confuse information heard from one source as if they experienced it themselves. In the case of simultaneous lineups where photos are presented at the same time, witnesses often do not recognize anyone immediately. Thereafter, they compare one photo against another to look for the person that most matches their memory. Those witnesses who identify someone within 10 to 12 seconds

are more likely to be accurate. Those identifications where witnesses compare photos and decide one individual "looks like" the suspect are not as reliable. In addition, those individuals conducting the identification may unwittingly influence the outcome through verbal or nonverbal communication.

Photographic identifications may be influenced by "unconscious transference" when the witness does not identify anyone initially, but after a period of time passes is shown another lineup. The witness often selects the photograph of an individual with a similar face as the perpetrator. This is because once a person sees a photograph, it has familiarity in his or her mind. If the same witness sees the photograph again in a group, it becomes very familiar. When the witness is repeatedly shown the same photographic lineup, they interpret an implicit message that they did it wrong the first time and must try again. When Dr. Eisen was presented with a hypothetical identification process that mirrored that in this case, he concluded that the witnesses who are repeatedly shown the same photograph becomes familiar with that individual's face. If the same photographic display is shown to the witness shortly before he or she testifies, it would possibly refresh memory. Studies reveal that there is not a significant relationship between confidence in an identification and accuracy. The pressure of a situation might cause witnesses to falsely identify the perpetrator of the crime.

When a hypothetical was posed to Dr. Eisen involving a witness who told the police that she only saw the back of the individual at the time of the crime but later identified two individuals from photographic arrays as looking like the driver and passenger, he believed her identification immediately after the crime was the most accurate recollection. Not only does memory fade over time, but also there are more opportunities as time passes to get information from other sources.

III. DISCUSSION

A. Denial Of Section 995 Motion

1. Factual and procedural background

Luis joins Hector's argument that the trial court improperly denied their pretrial section 995 motions based on insufficient and unreliable identification evidence. Neither defendant cites authority setting forth the appropriate standard of review for such motion denials. Moreover, neither defendant supports this argument with evidence from the preliminary hearing. Following testimony at the preliminary hearing, the trial court allowed counsel to argue against holding defendants to answer. Hector's attorney, Christina Behle, argued that the eyewitness identification was unreliable. Luis's attorney, Linda Wieder, reiterated that argument. In holding defendants to answer, the magistrate noted: "What the defense is asking this court to do, basically, is find the identification testimony is simply not supported because of all the inconsistencies, the discrepancies, and discharge the defendants. [¶] I've given that a lot of thought, but - - and I've done some research on my own. And I think - - to get to the conclusion, I think the People are surviving here, shall we say, and that I'm going to hold them to answer. And I'll explain my reasoning in a minute. [¶] . . . [¶] I think the vehicle is key to linking the defendants to the crime, and I believe [S.A.] was quite clear about her identification of the vehicle. And there is a stipulation that Luis Romero was arrested in that very vehicle, or leaving the vehicle, on December 3rd, a few days after the incident. So we have Luis tied to the vehicle, and [S.A.] tying the vehicle to the crime in this case. [¶] We have the testimony of Gabriel Delgadillo, where we have Luis and Hector at his house. And I agree, there's some discrepancies - - serious ones - - about the time frame; but we do have them linked to the house. [¶] We have them both, according to his testimony, borrowing the vehicle. So through him, we're linking both Hector and Luis to

the vehicle, and [S.A.] linking the vehicle to the crime. [¶] Stepping back and looking at the various identifications by [S.A.] and [S.L.], taking a rather general and, I acknowledge, broad brush-stroke interpretation of their testimony, we have them - - I'll point out the imperfections of their I.D. [¶] But, through identification in court, we have them, at least - - Luis and Hector - - identified as being there at the scene of the crime, either as a shooter, or as the driver, or one of the shooters and the driver. We have them as resembling or looking like the people who did it. [¶] I mean, in court, they did make what appeared to be an I.D. One could say they merely said they resemble them, and that's arguable. Based on that, I think there's a reasonable suspicion."

The magistrate did express concern about the manner in which the photographic identifications were presented to the witnesses. Thereafter, the magistrate cited *People v. Zurica* (1964) 225 Cal.App.2d 25, 28-31, comparing the facts to those in this case. The witnesses in *Zurica* also had apparent inconsistencies in their identifications of other perpetrators of the kidnappings and robberies. The *Zurica* court held that the strength or weakness of an identification or discrepancies in testimony were for the jury to assess. (*Id*. at p. 31.) The magistrate ruled, "It's on this basis that I'm holding both defendants to answer."

Prior to trial, defendants filed section 995 dismissal motions on the ground probable cause did not exist to support the orders holding defendants to answer. Both motions were based upon the alleged impropriety of the witnesses' unreliable identifications. The trial court ruled: "My role as a reviewing court is to determine whether there was some evidence to support the Information. And in conducting this review, every legitimate inference that may be drawn from the evidence must be drawn in favor of the Information. So that's where things stand. [¶] We do have two eyewitnesses here. One eyewitness, [S.A.], identified both the defendants as the driver and the shooter. Another eyewitness, [S.L.], identified Hector Romero as the driver. We even had that evidence at the preliminary hearing. [¶] We also have identification of the vehicle and all the other things the magistrate heard and commented on." Following

argument by counsel, the trial court noted that Luis's counsel's argument "may succeed before a jury, but for purposes of a preliminary hearing, there was probable cause to hold your client and the codefendant to answer." Both dismissal motions were denied.

2. The motions were properly denied

Section 995 states in part: "(a) [T]he . . . information shall be set aside by the court in which the defendant is arraigned, upon his or her motion . . . [¶] . . . [¶] (2) If it is an information: [¶] . . . [¶] (B) That the defendant had been committed without reasonable or probable cause." The California Supreme Court has held: "[I]n proceedings under section 995 it is the magistrate who is the finder of fact; the superior court has none of the foregoing powers, and sits merely as a reviewing court; it must draw every legitimate inference in favor of the information, and cannot substitute its judgment as to the credibility or weight of the evidence for that of the magistrate. [Citation.] On review by appeal or writ, moreover, the appellate court in effect disregards the ruling of the superior court and directly reviews the determination of the magistrate holding the defendant to answer. [Citations.]" (*People v. Laiwa* (1983) 34 Cal.3d 711, 718; *People v. Hall* (1971) 3 Cal.3d 992, 996.) In order to prevail on a section 995 motion the defendant must show she or he was committed without reasonable or probable cause. The *Mower* court defined the test: "'"'Reasonable or probable cause' means such a state of facts as would lead a man of ordinary caution or prudence to believe, and conscientiously entertain a strong suspicion of the guilt of the accused. 'Reasonable and probable cause' may exist although there may be some room for doubt."' [Citations.]" (*People v. Mower* (2002) 28 Cal.4th 457, 473; *People v. Nagle* (1944) 25 Cal.2d 216, 222.) Our colleagues in the Court of Appeal for the First Appellate District have held: "Section 995 requires the superior court to determine, after review of the preliminary examination transcript, whether there was any substantial evidence to support the magistrate's ruling. [Citations.]" (*People v. Schoennauer* (1980)

103 Cal.App.3d 398, 404; see also *People v. Sherwin* (2000) 82 Cal.App.4th 1404,1411; *People v. Gephart* (1979) 93 Cal.App.3d 989, 995-996.) Moreover, as our colleagues in Division 3 of this Appellate District held: "'Every legitimate inference that may be drawn from the evidence must be drawn in favor of the information [citations].' [Citation.]" (*People v. Fine* (1997) 52 Cal.App.4th 1258, 1262-1263, citing *People v. Park* (1978) 87 Cal.App.3d 550, 560-561.)

At the preliminary examination, S.A. testified that Hector was the driver of the car which contained the three gang members. According to S.A., Hector produced a firearm at the outset of the confrontation between the rival gang members. She also testified that Luis and another gang member got out of the car driven by Hector. Mr. Bashian was initially shot by another gang member. Then, according to S.A., Luis fired another shot into Mr. Bashian. The foregoing is some evidence of defendants' guilt which forecloses us from reversing the order denying the dismissal motion. (*People v. Laiwa, supra,* 34 Cal.3d at p. 718; *Rideout v. Superior Court* (1967) 67 Cal.2d 471, 474.) Based on this testimony, the magistrate reasonably could have found there was probable cause to believe defendants were guilty of the charged offenses. All of the cited inconsistencies were for the magistrate to resolve. (*Perry v. Superior Court* (1962) 57 Cal.2d 276, 283-284; *People v. Park, supra,* 87 Cal.App.3d at p. 561.) Given our analysis, we need not discuss whether this issue may even be raised on appeal as a ground for reversal given the holding of *People v. Pompa-Ortiz* (1980) 27 Cal.3d 519, 529. (*People v. Lewis* (2006) 39 Cal.4th 970, 991; *People v. Mattson* (1990) 50 Cal.3d 826, 870.)

B. Evidentiary Issues

1. Admission of evidence of uncharged criminal conduct

a. factual and procedural background

Defendants argue that the trial court improperly admitted evidence of an "unrelated, uncharged" prior shooting. Luis argues that the admission of the evidence violates Evidence Code sections 352 and 1101, subdivision (b).[4] Prior to trial, Luis filed an in limine motion to exclude evidence of a shooting that occurred on November 9, 2004, at Pierce and Pala Streets. The victim was shot in the arm as he worked underneath his car. A witness saw two Latino men with heavy builds and little or no hair running while carrying guns. Police recovered multiple expended 9-millimeter Lugar and .40-caliber shell casings from the crime scene. Eleven of the nine-millimeter casings found at the scene of the November 9, 2004 shooting were fired from the Baretta found in Luis's possession when he was arrested on December 3, 2004. In addition, .40-caliber casings were recovered from the shooting in this case. The .40-caliber cartridges from the November 9, 2004 shooting were fired from the same firearm. A .40-caliber

---

[4] Evidence Code section 352 provides: "The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." Evidence Code section 1101, subdivision (b) provides: "Nothing in this section prohibits the admission of evidence that a person committed a crime, civil wrong, or other act when relevant to prove some fact (such as motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident, or whether a defendant in a prosecution for an unlawful sexual act or attempted unlawful sexual act did not reasonably and in good faith believe that the victim consented) other than his or her disposition to commit such an act."

magazine was also found under the car on December 3, 2004. Luis argued that the evidence recovered from the November 9, 2004 shooting was irrelevant to the homicide in this case. Luis further argued that the prejudicial effect of admitting the evidence outweighed any probative value.

Following argument by counsel and extensive discussion, the trial court denied the motions and limited the admissibility of the evidence to the issue of identity, "The court finds that the proffered evidence of the November 9th, 2004, and December 3, 2004, incidents, as limited by the court, has substantial probative value and that probative value is not substantially outweighed by the probability that its admission will necessitate undue consumption of time or create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." The trial court found that the fact that someone was wounded in the November 9, 2004 shooting was irrelevant. The trial court noted that the only purpose of introducing this evidence was to constitute circumstantial evidence of identity of Luis at the November 24, 2004 shooting. In reaching that conclusion, the trial court assessed the prosecutor's argument noting: "They're relying on the fact that a nine-millimeter gun was retrieved from [Luis], they're relying on the fact that that gun was used in the November 9th shooting, and they're relying on the testimony of that witness who said somebody pointed a 9-millimeter gun at the - - during the November 24th shooting. [¶] From what I understand, this is not a situation where the People are saying only a .40-caliber gun was used. As I understand it, they're allowing for the possibility that there might have been other guns displayed there, if not shot, or that other types of guns were used, but no casings were found or projectiles from another gun recovered that were identifiable." The trial court also found the issue would not involve a significant amount of trial time.

The trial court relied on the analysis in *People v. Cox* (2003) 30 Cal.4th 916, 956: "'When the specific type of weapon used to commit a homicide is not known, it may be permissible to admit into evidence weapons found in the defendant's possession some time after the crime that could have been the weapons employed. There need be no

conclusive demonstration that the weapon in defendant's possession was the murder weapon. [Citations.] When the prosecution relies, however, on a specific type of weapon, it is error to admit evidence that other weapons were found in his possession, for such evidence tends to show, not that he committed the crime, but only that he is the sort of person who carries deadly weapons. [Citations.]' [Citation.]" (Quoting *People v. Riser* (1956) 47 Cal.2d 566, 577.) The trial court noted: "Here as I understand it, the prosecution is not saying that the only weapon that was used or displayed in the November 24th shooting was a 40-caliber gun. They're allowing that the other guns may have been used, including a 9-millimeter. So they're not foreclosed by this case law from utilizing that later evidence."

Following S.A's testimony that the driver held what she *thought* looked like a nine-millimeter gun, Luis filed a motion to reconsider the admissibility of the evidence of the November 9, 2004 shooting. The motion was denied. The trial court ruled that Luis's argument went to the weight of the evidence rather than its admissibility.

b. the trial court could properly admit the weapon evidence

Trial courts have broad discretion concerning the admission of evidence. (*People v. Anderson* (2001) 25 Cal.4th 543, 591; *People v. Smithey* (1999) 20 Cal.4th 936, 973-974.) Our Supreme Court has repeatedly held: "As with all relevant evidence . . . the trial court retains discretion to admit or exclude evidence . . . . [Citations.] A trial court's exercise of discretion in admitting or excluding evidence is reviewable for abuse [citation] and will not be disturbed except on a showing the trial court exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice [citation]." (*People v. Rodriguez* (1999) 20 Cal.4th 1, 9-10; *People v. Minifie* (1996) 13 Cal.4th 1055, 1070; *People v. Rodrigues* (1994) 8 Cal.4th 1060, 1124-1125; *People v. Cudjo* (1993) 6 Cal.4th 585, 609.) We also review a trial

court's ruling under Evidence Code section 1101 for abuse of discretion. (*People v. Abilez* (2007) 41 Cal.4th 472, 500; *People v. Gray* (2005) 37 Cal.4th 168, 202.)

In this case, the trial court gave extensive reasoning regarding not only the relevance of the challenged evidence but also its probative value as to identity. The trial court carefully weighed the amount of time necessary to introduce the evidence in question as well as any possible confusion it might cause. In limiting the admissibility to the issue of identity, the trial court prevented any prejudice related to the mention of either a victim in the November 9, 2004 shooting or the fact that Luis was being pursued on December 3, 2004 for a carjacking. Moreover, the jurors were instructed with CALCRIM No. 303 as to the limited purpose of this evidence as follows: "During the trial, certain evidence was admitted which involved a number of bullet casings recovered by the police following a shooting on November 9, 2004, in the proximity of Pierce and Pala Streets. [¶] The evidence, if believed, is to be considered for the limited purpose of determining if it tends to establish the identity of the person who committed the crime charged in this case. Do not consider this evidence for any other purpose and do not conclude from this evidence that the defendant has a bad character or is disposed to commit crime." The California Supreme Court has consistently stated that on appeal: "'"Jurors are presumed to be intelligent, capable of understanding instructions and applying them to the facts of the case."' [Citation.]" (*People v. Carey* (2007) 41 Cal.4th 109, 130, quoting *People v. Lewis* (2001) 26 Cal.4th 334, 390; *People v. Yeoman* (2003) 31 Cal.4th 93, 139; *People v. Bradford* (1997) 15 Cal.4th 1229, 1337; *People v. Osband* (1996) 13 Cal.4th 622, 714; *People v. Kemp* (1961) 55 Cal.2d 458, 477; see *Cassim v. Allstate Ins. Co.* (2004) 33 Cal.4th 780, 803.) The trial court could properly admit the evidence of the November 9, 2004 shooting.

2. Evidence of Luis' flight on December 3, 2004

a. factual and procedural background

Luis argues the trial court improperly admitted evidence of his flight from the police on December 3, 2004. Luis reasons the December 3, 2004 flight evidence was unconnected to the November 24, 2004 shooting and constituted inadmissible propensity evidence. Prior to trial in this case, the prosecutor filed a motion to admit flight evidence and possession of firearm evidence. The prosecution theory was that evidence of Luis's flight from police on December 3, 2004, was admissible to demonstrate his consciousness of guilt as to the November 24, 2004 shooting even though his apprehension followed his involvement in a December 2, 2004 carjacking. The prosecutor argued that the flight evidence was admissible even when a defendant has not been accused and the flight is remote from the crime. At the hearing on the motion, the prosecutor explained: "[O]ne of the reasons why [Luis] fled was because he had committed an earlier murder and quite possibly the gun that he discarded could have been the murder weapon in that case, and that was another reason why he threw and attempted to discard and hide that weapon from the police." When counsel argued the motion, the trial court noted it would not allow any evidence of the carjacking. The trial court noted: "As we know from a number of these Supreme Court cases, a flight does not have to be immediately after the crime to qualify as evidence of flight that can be considered. [¶] In the case of People versus Mason, there was a four-week interval. In the case of People versus Santo, it was over a month. In the case of People versus Turner, it was about 20 days. Here we have a difference of nine days." In ruling the flight evidence admissible, the trial court noted: "[W]e do have flight . . . on the part of [Luis] after the alleged murder. This alleged flight occurred nine days later. It does qualify as circumstantial evidence, tending to show the defendant's guilt. [¶] "[A]s the cases indicate, the flight does not have to be immediately following the crime. [¶] . . . [¶] I previously have

given lengthy evaluation under Penal Code section 352. I'm not going to repeat everything I said there, but suffice it to say here that the facts surrounding the December 3rd, 2004, incident are considerably less inflammatory to the facts involving the [November 24, 2004] homicide, that the evidence relating to the December 3rd events will not consume an unreasonable amount of time, and there's not a substantial risk of confusing the issues or misleading the jury."

b. the flight evidence could properly be admitted

Luis argues that the flight evidence was more prejudicial than probative and suggested that he was "predisposed" to commit crimes. Section 1127c states: "In any criminal trial or proceeding where evidence of flight of a defendant is relied upon as tending to show guilt, the court shall instruct the jury substantially as follows: [¶] The flight of a person immediately after the commission of a crime, or after he is accused of a crime that has been committed, is not sufficient in itself to establish his guilt, but is a fact which, if proved, the jury may consider in deciding his guilt or innocence. [¶] The weight to which such circumstance is entitled is a matter for the jury to determine."

As set forth above, we review the trial court's admission of evidence under Evidence Code sections 352 and 1101 for abuse of discretion. (*People v. Abilez, supra,* 41 Cal.4th at p. 500; *People v. Gray, supra,* 37 Cal.4th at p. 202.) Luis argues that because his flight followed the December 2, 2004 carjacking, it could not suggest a consciousness of guilt as to the November 24, 2004 murder. The California Supreme Court recently addressed this flight issue where intervening crimes occurred. In *People v. Loker* (2008) 44 Cal.4th 691, 706, the defendant argued that his flight in Arizona did not necessarily show guilt about crimes in California. The defendant asserted he committed other serious crimes in Arizona in the interim. Our Supreme Court held: "The jury could reasonably find that this departure [from California], as well as the chase in Arizona, constituted flight from the California crimes. The fact that the chase may

have occurred partly because of the Arizona crimes does not preclude the inference that defendant also fled to escape capture for his even more serious crimes in California. 'Common sense . . . suggests that a guilty person does not lose the desire to avoid apprehension for offenses as grave as multiple murder[] after only a few' days. (*People v. Mason* (1991) 52 Cal.3d 909, 941 [flight four weeks after murder].)" (*Ibid.*; see also *People v. Turner* (1994) 8 Cal.4th 137, 154, 201; *People v. Santo* (1954) 43 Cal.2d 319, 327-330.) Moreover, in *People v. Mason, supra*, 52 Cal.3d at page 942, our Supreme Court held, "[T]he existence of other crimes which may explain the defendant's flight goes to the weight, not to the admissibility, of evidence." The trial court in this case carefully deleted any reference to the carjacking offense so as not to prejudice Luis. Without abusing its discretion, it could properly find that the flight on December 3, 2004 could be considered by the trier of fact as it related to the November 24, 2004 murder.

3. Sufficient evidence supports Luis' conviction

Luis argues there was insufficient evidence to support his conviction. Luis argues: the identifications by S.A. and S.L. are "patently insufficient as a matter of law to place [him] on Tobias Street on November 24, 2004"; the identifications were the result of improper police procedures; and, the conflicting descriptions of the Yukon truck were too inconsistent. We disagree.

In reviewing a challenge of the sufficiency of the evidence, we apply the following standard of review: "[We] consider the evidence in a light most favorable to the judgment and presume the existence of every fact the trier could reasonably deduce from the evidence in support of the judgment. The test is whether substantial evidence supports the decision, not whether the evidence proves guilt beyond a reasonable doubt." (*People v. Mincey* (1992) 2 Cal.4th 408, 432, fn. omitted; *People v. Hayes* (1990) 52 Cal.3d 577, 631; *People v. Johnson* (1980) 26 Cal.3d 557, 576.) Our sole function is to determine if *any* rational trier of fact could have found the essential elements of the crime

beyond a reasonable doubt. (*Jackson v. Virginia, supra,* 443 U.S. at p. 319; *People v. Bolin* (1998) 18 Cal.4th 297, 331; *People v. Marshall* (1997) 15 Cal.4th 1, 34; *People v. Ochoa* (1993) 6 Cal.4th 1199, 1206; *People v. Barnes* (1986) 42 Cal.3d 284, 303; *Taylor v. Stainer, supra,* 31 F.3d at pp. 908-909.) The standard of review is the same in cases where the prosecution relies primarily on circumstantial evidence. (*People v. Rodriguez, supra,* 20 Cal.4th at p. 11; *People v. Stanley* (1995) 10 Cal.4th 764, 792; *People v. Bloom* (1989) 48 Cal.3d 1194, 1208; *People v. Bean* (1988) 46 Cal.3d 919, 932.) The California Supreme Court has held, "Reversal on this ground is unwarranted unless it appears 'that upon no hypothesis whatever is there sufficient substantial evidence to support [the conviction].'" (*People v. Bolin, supra,* 18 Cal.4th at p. 331, quoting *People v. Redmond* (1969) 71 Cal.2d 745, 755.)

Here, in addition to the identification testimony of S.L. and S.A., the trier of fact had other testimony and evidence to consider. Mr. Valdez, who was delivering mail at the time of the shooting, saw a silver or gray sports utility truck speeding away from the scene. Mr. Valdez identified the truck depicted in exhibit No. 4 as similar to the one he saw on November 24, 2004. Luis jumped and ran from the gray Yukon truck owned by Gabriel Sr. on December 3, 2004. According to Gabriel Jr., the truck had been driven by defendants on numerous occasions. Gabriel Jr. knew that his father had been a gang member and that both Luis and Hector were members of a local gang. When Luis was arrested, he attempted to dispose of a nine-millimeter semiautomatic handgun by throwing it under a car. That handgun was the weapon used in a November 9, 2004 shooting. S.A. saw Hector holding a "9" at the time of the shooting of Mr. Bashian, which was identified as a nine-millimeter handgun. S.A. was a member of a gang and had seen such guns previously. A .40-caliber magazine was also found under the Yukon on December 3, 2004. In addition, the expended casings recovered at the Tobias Street shooting in this case were fired from the same gun as cartridges found at a November 9, 2004 incident on Pierce and Pala Streets. Moreover, our Supreme Court has held: "'"Conflicts and even testimony which is subject to justifiable suspicion do not justify the

reversal of a judgment, for it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts upon which a determination depends. [Citations.]"' [Citation.]" (*People v. Lewis, supra,* 26 Cal.4th at p. 361; see also *People v. Koontz* (2002) 27 Cal.4th 1041, 1078 ["If the verdict is supported by substantial evidence, we must accord due deference to the trier of fact and not substitute our evaluation of a witness's credibility for that of the fact finder."]; *People v. Ochoa, supra,* 6 Cal.4th at p. 1206; *People v. Sanchez* (2003) 113 Cal.App.4th 325, 330.) Despite the inconsistencies in identification by S.A. and S.L. as well as their contradictory testimony, their credibility was for the jury to determine. Substantial evidence supported the verdicts.

C. Denial of Section 1118.1 Motion

1. Factual and procedural background

After the prosecution had rested, Hector made a section 1118.1[5] motion. Luis joined the judgment of acquittal motion. Defense counsel argued that identifications of S.A. and S.L. were not credible. For example, S.L. testified at various times that Luis was the driver and the passenger. When questioned further, S.L. stated that she made a mistake and Hector was the driver. S.L. initially told Detective Martinez that she had only seen the back of the passenger. However, at trial S.L. said she saw the right-side profile of the front passenger. Counsel further argued that S.A. and S.L. contradicted

---

5 Section 1118.1 provides in pertinent part, "In a case tried before a jury, the court on motion of the defendant or on its own motion, at the close of evidence on either side and before the case is submitted to the jury for decision, shall order the entry of a judgment of acquittal of one or more of the offenses charged in the accusatory pleading if the evidence then before the court is insufficient to sustain a conviction of such offense or offenses on appeal. . . ."

each other. S.A.'s testimony also contradicted what she told Detective Martinez immediately after the shooting. In denying the motion, the trial court noted: "The court finds that there is sufficient evidence before the court to sustain a conviction of the offenses on appeal, as well as the special allegations. [¶] . . . The test is whether from the evidence, including reasonable inferences to be drawn therefrom, there is any substantial evidence of each element of the offense charged. [¶] In this context, substantial evidence is evidence that is reasonable, reliable, and of solid value, for which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt."

2. Substantial evidence supported the denial of the judgment of acquittal motion

We utilize the substantial evidence test to determine whether the prosecution has introduced sufficient evidence to meet its burden of proof beyond a reasonable doubt. (*Jackson v. Virginia, supra,* 443 U.S. at pp. 318-319; *People v. Osband, supra,* 13 Cal.4th at p. 690; *Taylor v. Stainer, supra,* 31 F.3d at pp. 908-909.) The California Supreme Court has held, "The substantial evidence test applies both when an appellate court is reviewing on appeal the sufficiency of the evidence to support a conviction and when a trial court is deciding the same issue in the context of a motion for acquittal under Penal Code section 1118.1 at the close of evidence." (*People v. Cuevas* (1995) 12 Cal.4th 252, 261; see also *People v. Cole* (2004) 33 Cal.4th 1158, 1212-1213; *People v. Crittenden* (1994) 9 Cal.4th 83, 139, fn. 13 [evidence includes all reasonable inferences that may be drawn]; *People v. Trevino* (1985) 39 Cal.3d 667, 695, overruled on another ground in *People v. Johnson* (1989) 47 Cal.3d 1194, 1221.) The Supreme Court further held: "A trial court should deny a motion for acquittal under section 1118.1 when there is any substantial evidence, including all reasonable inferences to be drawn from the evidence, of the existence of each element of the offense charged. [Citations.]" (*People v. Mendoza* (2000) 24 Cal.4th 130, 175; *People v. Mincey, supra,* 2 Cal.4th at p. 432, fn. 2; *People v. Ainsworth* (1988) 45 Cal.3d 984, 1022.) We review the trial court's section

1118.1 ruling independently. (*People v. Cole, supra,* 33 Cal.4th at p. 1213; *People v. Trevino, supra,* 39 Cal.3d at p. 695.)

As set forth above, in addition to the eyewitness identification testimony given by S.A. and S.L., the prosecutor presented substantial circumstantial evidence of defendants' involvement in the fatal shooting of Mr. Bashian. The testimony of Mr. Valdez and Gabriel Jr. placed the gray Yukon truck at the scene and made it highly likely that either defendant was driving the truck. Luis was subsequently arrested when he fled from the gray Yukon. Luis disposed of a nine-millimeter handgun just prior to his apprehension. That same handgun matched not only Ms. A's description of the type of gun held by the driver on November 24, 2004, but also the firearm used in the November 9, 2004 shooting. Other .40-caliber cartridges recovered from the November 9, 2004 shooting were fired from the same weapon as those recovered from the shooting in this case. Defendants were members of a rival gang. The shooting was gang-related. Substantial evidence supports the trial court's denial of the section 1118.1 motion.

D. Instructions

1. Pinpoint instruction on eyewitness identification

a. factual and procedural background

Defendants argue the trial court improperly denied their request that the jurors be instructed with a modified version of CALCRIM No. 315[6] on eyewitness identification.

---

6 The jurors were instructed with CALCRIM No. 315 as follows: "You have heard eyewitness testimony identifying the defendant. As with any other witness, you must decide whether an eyewitness gave truthful and accurate testimony. [¶] In evaluating identification . . . testimony, consider the following questions: [¶] Did the witness know or have contact with the defendant before the event? [¶] How well could the witness see the perpetrator? [¶] What were the circumstances affecting the witness's ability to

Counsel for Luis submitted a modified version of CALCRIM No. 315 including the following questions: "Did the witness discuss her observations with any other witness prior to making an identification? [¶] . . . [¶] Was the witness able to identify the defendant in a photographic lineup? [¶] Was the witness asked to look at the same photographic lineup on more than one occasion? [¶] Was the witness shown the photographic lineup of the defendant prior to making an in-court identification?" The trial court rejected some of the modifications, noting: "When we discussed this informally, I did agree to move that one sentence, which read 'Were there any other circumstances affecting the witness's ability to make an accurate identification,' to make it the last sentence, which would immediately follow the question 'Was the witness able to identify the defendant in a photographic lineup?' [¶] So that covers your request. You certainly can argue this, but your proposed questions are case specific. They're not the type of questions that are general in nature, as represented by the rest of the questions here. You might as well ask, 'Was the witness given the photograph face up or face down?' 'Were there more than five seconds between those' - - [¶] . . . [¶] Those are all specific questions, things you might argue, but they're not the type of questions that are appropriate in this instruction. So for that reason, the court denied those requests. The

---

observe, such as lighting, weather conditions, obstructions, distance and duration of observation? [¶] How closely was the witness paying attention? [¶] Was the witness under stress when he or she made the observation? [¶] Did the witness give a description, and how does that description compare to the defendant? [¶] How much time passed between the event and the time when the witness identified the defendant? [¶] Was the witness asked to pick the perpetrator out of a group? [¶] Did the witness ever fail to identify the defendant? [¶] Did the witness ever change his or her mind about the identification? [¶] How certain was the witness when he or she made an identification? [¶] Are the witness and the defendant of different races? [¶] Was the witness able to identify other participants in the crime? [¶] Was the witness able to identify the defendant in a photographic or physical lineup? [¶] Were there any other circumstances affecting the witness's ability to make an accurate identification? [¶] The People have the burden of proving beyond a reasonable doubt that it was the defendant who committed the crime. If the People have not met this burden, you must find . . . the defendant not guilty."

court believes that this last sentence in the instruction fully covers everything you want to argue to the jury."

b. the trial court could properly refuse to give the modified instruction

Our Supreme Court has held that a defendant has a right to instructions that pinpoint the defense theory. (*People v. Noguera* (1992) 4 Cal.4th 599, 648; *People v. Sears* (1970) 2 Cal.3d 180, 189-190.) However, the California Supreme Court has also held: "'The court must, however, refuse an argumentative instruction that is, an instruction "of such a character as to invite the jury to draw inferences favorable to one of the parties from specified items of evidence."' [Citation.]" (*People v. Panah* (2005) 35 Cal.4th 395, 486; *People v. Garceau* (1993) 6 Cal.4th 140, 192; *People v. Mincey*, *supra*, 2 Cal.4th at p. 437.) Here, Luis's pinpoint instructions would have served to emphasize the discrepancies in the eyewitnesses' various identifications and "invite the jury" to draw inferences favorable to defendants. Such emphasis was more properly addressed in the arguments of counsel. (*People v. Garceau*, *supra*, 6 Cal.4th at p. 192; *People v. Wright* (1988) 45 Cal.3d 1126, 1135.)

In fact, counsel did have an opportunity to address these issues at length during their closing arguments. Counsel for Hector, Herbert Barish, referred to the claim by S.A. that she never forgot a face. Mr. Barish further argued regarding S.L.'s identifications: "She started out that she couldn't I.D. anybody. She saw the back of the head of the person - - of a person getting in the vehicle, getting in the passenger's side. She couldn't even tell Officer Martinez whether the person - - and his words were something like this - - Hispanic, Black, or light complected." Mr. Barish continued regarding S.L.'s testimony: "This is the translation that's connected to exhibit 19: 'The passenger was the one who shot. He was the one who exited the car.' That's what [S.L.] says. [¶] Where did it come from? Something else was involved. She conceded that she didn't know at the time. She was asked, did somebody tell you about this between the

time of the offense and the time that she said this? She said yes. When and who? 'I don't know.' [¶] . . . [¶] And what we know is something or someone was influencing [S.L.] Her story changed. She added things. She told us things that she wouldn't know about. She told us things that were just flat-out wrong. . . . [¶] And, by the way, one interesting aspect of the descriptions - - and these are the descriptions by both of these eyewitnesses, both [S.A.] and [S.L.] - - is when asked what were the circumstances surrounding the identifications of those six-packs - - there were a number of questions asked about that - - neither of them could remember. It's like a blank. "

Mr. Barish further argued that standard protocol regarding photo identifications were not followed when Luis and Hector were identified by these witnesses. Mr. Barish also pointed out the discrepancies in S.L.'s identification of the driver and the person who fired the shots between the time she viewed the photos, at the preliminary hearing, and at trial. Mr. Barish emphasized the varied statements given by S.A. at the time of the shooting as well as during her subsequent failures to identify anyone from photographic lineups and her ultimate identification of the defendants. Mr. Barish reminded the jurors about the testimony given by Dr. Eisen regarding identifications. Finally, Mr. Barish went through CALCRIM No. 315 and commented on each of the criteria related to the eyewitnesses in this case.

Likewise, Ms. Weider, counsel for Luis, argued extensively regarding the credibility of the eyewitnesses in this case. Regarding S.A., Ms. Weider argued: "[I]n her initial interview with Detective Martinez, what did she tell you? She told Detective Martinez what she was really able to see. [¶] But things changed over time. She glanced at the driver. Now she's gotten a much better look at the driver. She didn't see the passengers. Now she's got those faces she can remember; nothing will shake her. But her observations changed over time, and we know that." Ms. Weider reviewed the various descriptions, failures to identify a suspect, and ultimate identifications made by S.A.: "She had seen a picture of Luis Romero, Hector Romero, and Gabriel Delgadillo on October 10th, 2005, when she made no [identification]. And guess what she said

about that? She said she didn't pick anyone because she didn't recognize anybody. And she further admitted later on in her testimony that the - - when she picks - - when she picked Luis Romero's photograph on October 13th, she remembered that she had seen the picture before. Not seen him before. Seen the picture before. There's a big distinction." [¶] . . . [¶] And, oddly, something else I don't understand - - and maybe you all do - - but when [S.A.] looked at the 16-pack on the 13th of October, she pointed to two people, according to Detective Holmes. One was Luis Romero, one was Hector Romero. And what did she say to him, according to the detective? 'These guys both look like the driver.' 'Look like.' Not are. 'Look like.'" Ms. Weider also discussed in great detail the various identifications made by S.L. both prior to trial and at trial. Ms. Weider also reviewed the identification factors set forth in CALCRIM No. 315 and pointed out the weakness in both witnesses' identifications that would have been included in the modified version of the proposed modification. As a result, the required pinpoint instruction need not have been given.

In any event, the California Supreme Court has also held that a trial court need not give instructions which are adequately addressed by other properly given instructions. (*People v. Noguera, supra,* 4 Cal.4th at p. 648 [trial court properly refused to give pinpoint instruction where other instructions given adequately covered the defense]; *People v. Wright, supra,* 45 Cal.3d 1126, 1134-1138; *People v. Whitehorn* (1963) 60 Cal.2d 256, 265; *People v. Tapia* (1994) 25 Cal.App.4th 984, 1028.) We review the instructions as a whole to determine whether the jury was properly instructed. (*People v. Smithey, supra,* 20 Cal.4th at p. 987; *People v. Roybal* (1998) 19 Cal.4th 481, 525-526; *People v. Mendoza* (1998) 18 Cal.4th 1114, 1134.) CALCRIM No. 315, as given, adequately informed the jurors of the various factors they should consider in assessing the eyewitness identification. (See fn. 6, *supra.*) The jurors were also instructed on: witness credibility; a single witness's testimony; evaluating conflicting evidence; and prior witness statements. (CALCRIM Nos. 226, 301, 302, 318.) The instruction that defendants suggest should have been given was adequately addressed by and is

duplicative of the other instructions given by the trial court. The trial court could properly reject the modified instruction.

In any event, it is not reasonably probable that a judgment more favorable to defendant would have resulted had the instruction been given. (*People v. Breverman* (1998) 19 Cal.4th 142, 165; *People v. Wims* (1995) 10 Cal.4th 293, 314-315.) The testimony presented by the defense concerning eyewitness identification coupled with defendants' attorneys' arguments adequately addressed these issues. No prejudice resulted.

2. Other crimes instruction

a. factual and procedural background

Luis argues that the trial court improperly refused to instruct the jury with CALCRIM No. 375[7] regarding other crimes evidence. In rejecting the proposed

---

[7] As proposed, CALCRIM No. 375 states: "The People presented evidence that the defendant committed another offense the offense of shooting at an inhabited dwelling that was not charged in this case. [¶] The People presented evidence of other behavior by the defendant that was not charged in this case that the defendant committed a shooting on November 9, 2004. [¶] You may consider this evidence only if the People have proved by a preponderance of the evidence that the defendant in fact committed the uncharged offense. Proof by a preponderance of the evidence is a different burden of proof than proof beyond a reasonable doubt. A fact is proved by a preponderance of the evidence if you conclude that it is more likely than not that the fact is true. [¶] If the People have not met this burden, you must disregard this evidence entirely. If you decide that the defendant committed the uncharged offense, you may, but are not required to, consider that evidence for the limited purpose of deciding whether or not: [¶] The defendant was the person who committed the offense alleged in this case. [¶] In evaluating this evidence, consider the similarity or lack of similarity between the uncharged offense and the charged offense. [¶] Do not consider this evidence for any other purpose except for the limited purpose of determining whether defendant was the person who committed the charged offense. [¶] Do not conclude from this evidence that

instruction, the trial court noted: "That requested instruction is rejected for, among other reasons - - for the following reasons. And I've talked about this before on several occasions. As I understand the People's proof here, it's not being offered because of the similarity of the crimes. Rather, it's instead being offered as circumstantial evidence showing a connection between these two guns; in other words, that the defendant's gun was tied to the .40-caliber gun that was used in the killing of the decedent in this case. [¶] It doesn't - - from the prosecution standpoint, as I understand it, it doesn't matter what type of shooting was involved here. It could have been shooting of two guns in the air. They could have been shooting at a car or a house or a person. It's not the similarity of the prior offense and the current offense that's significant. It's simply the connection between these two guns that's being used as circumstantial evidence. So I believe this instruction is misleading. [¶] Secondly, your instruction requires a preponderance of the evidence standard. I'm not agreeing to that. I'm requiring proof beyond a reasonable doubt of all the circumstantial evidence here."

b. the trial court did not have a duty to give the other crimes evidence instruction

A trial court is obliged to instruct, even without a request, on the general principles of law which relate to the issues presented by the evidence. (§§ 1093, subd. (f), 1127; *People v. Abilez*, *supra*, 41 Cal.4th at p. 517; *People v. Wims*, *supra*, 10 Cal.4th at p. 303; *People v. Turner* (1990) 50 Cal.3d 668, 690; *People v. Flannel* (1979) 25 Cal.3d 668, 680-681.) When the evidence is minimal and insubstantial, there is no duty to instruct. (*People v. Barton* (1995) 12 Cal.4th 186, 196, fn. 5; *People v. Bunyard*

---

the defendant has a bad character or is disposed to commit crime. If you conclude that the defendant committed the uncharged offense, that conclusion is only one factor to consider along with all the other evidence. It is not sufficient by itself to prove that the defendant is guilty of murder, in violation of Penal Code section 187a. The People must still prove each element of every charge beyond a reasonable doubt."

(1988) 45 Cal.3d 1189, 1232; *People v. Flannel, supra*, 25 Cal.3d at p. 684; *People v. Mayberry* (1975) 15 Cal.3d 143, 151.) In this case, the prosecution introduced evidence of the November 9, 2004 shooting only for the purpose of demonstrating a connection between the firearms used on November 24, 2004. Moreover, as set forth previously, the jurors were instructed with CALCRIM No. 303 as to the limited purpose of this evidence as follows: "During the trial, certain evidence was admitted which involved a number of bullet casings recovered by the police following a shooting on November 9, 2004, in the proximity of Pierce and Pala Streets. [¶] The evidence, if believed, is to be considered for the limited purpose of determining if it tends to establish the identity of the person who committed the crime charged in this case. Do not consider this evidence for any other purpose and do not conclude from this evidence that the defendant has a bad character or is disposed to commit crime." No further instruction was required.

3. Flight instruction

a. overview

Luis argues that the trial court improperly instructed the jury with a modified version of CALCRIM No. 372 on flight. Luis argues the words "immediately after the crime was committed" were deleted from the instruction. Luis deems this language "a crucial element of section 1227c" and its removal was error. Luis further argues that the instruction violated his constitutional right to due process. We disagree.

b. factual and procedural background

CALCRIM No. 372 states: "If the defendant fled [or tried to flee] (immediately after the crime was committed/[or] after (he/she) was accused of committing the crime), that conduct may show that (he/she) was aware of (his/her) guilt. If you conclude that the

defendant fled [or tried to flee], it is up to you to decide the meaning and importance of that conduct. However, evidence that the defendant fled [or tried to flee] cannot prove guilt by itself." During instructional discussions, counsel for Luis objected to the proposed deletion of the word "immediately," arguing: "[I]t changes the entire context in which the jury is supposed to consider this instruction, . . . [¶] I think this is overbroad the way it's worded. I don't think that there's any justification for taking out the word 'immediately,' because that is the language of the statute, or at least part of it, and I note that the court has also included the - - after he was accused of committing the crime. [¶] I submit to the court I don't believe there was any evidence presented that my client had any awareness that - - " Thereafter, the trial court agreed to remove the words "or after he was accused of committing the crime," and explained: "I am instructing the jury substantially in this language. The word 'immediately' is not the crux of this instruction. [¶] As I mentioned earlier, there are a number of cases - - and I cited these before, including People versus Mason, People versus Santo, People versus Turner - - where there was a long interval, ranging from 20 days to over a month, between the alleged flight and the alleged offense. These are Supreme Court cases. [¶] So it's clear that the courts do not require that the flight be immediate in order for the jury to consider someone's flight." The trial court continued: "I also cited earlier the cases of People versus Hill and People versus Chessman, again Supreme Court cases, that allow variance in the language. [¶] You would not ordinarily need any instruction, because it makes common sense that flight can be an indication of consciousness of guilt. The value of this instruction is that the jury is instructed that evidence that the defendant fled or tried to flee cannot prove guilt by itself. [¶] This, in a sense, is a limiting instruction. That is the value of it. The crux of it is not whether the flight was immediate or not." The trial court further explained: "I think it's appropriate here because I think - - I believe if we include 'immediately,' it could be confusing to the jury, because I think that most people would think 'immediately' means right after. Maybe within 24 hours. Who knows? [¶] It might be confusing, and they might think that they can't consider the later flight

because of that word. So I think it's appropriate to take it out to avoid jury confusion here."

The jury was later instructed as follows: "If the defendant fled or tried to flee after the crime was committed or - - that conduct may show that he is aware of his guilt. If you conclude that the defendant fled or tried to flee, it is up to you to decide the meaning and importance of that conduct. However, evidence that the defendant [] fled or tried to flee cannot prove guilt by itself."

c. the trial court could properly delete the reference to "immediately"

The Bench Note to CALCRIM No. 372 (Fall 2007 ed.), page 123 points out: "If the defendant's flight did not occur immediately after the crime was committed, the trial court should give the second option in the parenthetical. (*People v. Carrera* (1989) 49 Cal.3d 291, 313 [flight from county jail]; *People v. Farley* (1996) 45 Cal.App.4th 1697, 1712 [where flight was from custody, the instructional language 'immediately after the commission of a crime' was irrelevant but harmless].)" The trial court could reasonably delete the reference to "immediately" in the flight instruction based upon the fact that Luis's flight took place nine days after the murder. (See *People v. Chessman* (1951) 38 Cal.2d 166, 184, overruled on another point in *People v. Daniels* (1969) 71 Cal.2d 1119, 1139; *People v. Hill* (1967) 67 Cal.2d 105, 120 ["the giving of an instruction on flight in language which varies slightly from that of section 1127c is not error"].)

E. Cumulative Error

Defendants argue that the cumulative effect of errors committed by the trial court requires the reversal of his convictions. We disagree. There has been no showing of cumulative prejudicial error. (*People v. Watson* (2008) 43 Cal.4th 652, 705; *People v. Abilez*, *supra*, 41 Cal.4th at p. 523; *People v. Boyette* (2002) 29 Cal.4th 381, 467-468;

People v. Seaton (2001) 26 Cal.4th 598, 675, 691-692 [few errors identified were minor and either individually or cumulatively would not alter the outcome of the trial]; *People v. Catlin* (2001) 26 Cal.4th 81, 180 [same]; *People v. Cudjo, supra*, 6 Cal.4th at p. 630 [no cumulative error when the few errors which occurred during the trial were inconsequential].) Whether considered individually or for their cumulative effect, any of the errors alleged did not affect the process or accrue to defendant's detriment. (*People v. Sanders* (1995) 11 Cal.4th 475, 565; *People v. Cudjo, supra*, 6 Cal.4th at p. 637.) As the California Supreme Court has long held, "[A] defendant [is] entitled to a fair trial but not a perfect one. (*People v. Cunningham* (2001) 25 Cal.4th 926, 1009; *People v. Mincey, supra*, 2 Cal.4th at p. 454; *People v. Miranda* (1987) 44 Cal.3d 57, 123.) In this case, defendants received much, much more than a fair trial.

F. Sentencing

1. Imposition of upper term on count 2

a. factual and procedural background

Luis argues that the trial court improperly imposed the upper term as to count 2, firearm possession by a felon. Luis asserts the trial court relied on the same factor, possession of the gun used in the homicide, to enhance his sentence pursuant to section 12022.53, subdivision (d). Relying upon *Apprendi v. New Jersey* (2000) 530 U.S. 466, 490, *Blakely v. Washington* (2004) 542 U.S. 296, 303-304, and *Cunningham v. California* (2007) 549 U.S. 270, ___ [127 S.Ct. 856, 863-864], Luis further argues that because the trial court's reasons for imposing the upper term were not found true by a jury, his sentence as to count 2 must be reversed.

At the sentencing hearing, the trial court imposed sentence as to count 2 as follows: "Defendant is sentenced to a term of - - in prison of three years. This is the high

term, and the court gives the following reasons for the use - - imposing the high term: [¶] The defendant used a gun in committing a murder; the defendant has engaged in violent conduct that indicates a serious danger to society; the defendant was on probation when the crime was committed. The sentence is appropriate to punish the defendant, protect society, and deter others from criminal conduct."

b. the trial court could properly impose the high term based upon one aggravating factor

In *People v. Black* (2007) 41 Cal.4th 799, 805-824, our Supreme Court examined the imposition of an upper term under the state determinate sentencing law in light of *Cunningham v. California*, *supra*, 549 U.S. at p. ___ [127 S.Ct. at pp. 863-864], "[A]s long as a single aggravating circumstance that renders a defendant *eligible* for the upper term sentence has been established in accordance with the requirements of *Apprendi* [*v. New Jersey, supra*, 530 U.S.] and its progeny, any additional fact finding engaged in by the trial court in selecting the appropriate sentence among the three available options does not violate the defendant's right to jury trial." (*People v. Black, supra,* 41 Cal.4th. at p. 812, original italics.) Our Supreme Court further held, "It follows that imposition of the upper term does not infringe upon the defendant's constitutional right to jury trial so long as one legally sufficient aggravating circumstance has been found to exist by the jury, has been admitted by the defendant, or is justified based upon the defendant's record of prior convictions." (*People v. Black, supra,* 41 Cal.4th. at p. 816; see *People v. Baughman* (2008) 166 Cal.App.4th 1316, 1323.) Here, the trial court noted that Luis was on probation at the time the offense was committed. As a result, Luis's right to a jury trial was not violated when the trial court imposed the upper term. Luis acknowledges the holding in *Black* as well as subsequent cases that have held a defendant's probation status falls within the prior conviction exception and may be relied upon to impose the upper term. (See *People v. Guess* (2007) 158 Cal.App.4th 283, 302; *People v. Yim*

(2007) 152 Cal.App.4th 366, 371.) However, defendant urges us to find the probation status violated the spirit of *Apprendi*. We are bound by the Supreme Court's decision in *Black*. (*People v. Birks* (1998) 19 Cal.4th 108, 116, fn. 6; *Auto Equity Sales v. Superior Court* (1962) 57 Cal.2d 450, 455.)

2. Restitution

Defendants argue and the Attorney General concedes that the abstracts of judgment should be corrected to accurately reflect the joint and several liability of the restitution imposed. The prosecutor: requested defendants be ordered to pay restitution to Mr. Bashian's family for the funeral and burial expenses in the amount of $7,491, less the $5,000 paid by the state; further requested the defendants repay the State Victims' Compensation Board for the $5,000 paid toward the funeral and burial expenses; stated defendants should be jointly and severally liable; and argued restitution should be ordered first paid to the Bashians and then to the victim compensation board. At sentencing, the trial court initially noted a restitution claim of "$2,491 to the Bashians and $5,000" to the State Victim's Compensation Board. However, the trial court then orally ordered: "Each of the defendants is ordered to pay restitution in the amount of $2,400.91 to Eliho . . . and Teresa Bashian, and each of the defendants is ordered to pay restitution in the amount of $5,000 to the State Victims' Compensation and Government Claims Board. Any restitution is to go first to the Bashians." Each defendant's abstract of judgment reflects restitution in the amount of $7,491 to victims pursuant to section 1202.4, subdivision (f). Luis's abstract of judgment indicates, "Make victim restitution to the California State Victims' Compensation Board." Hector's abstract of judgment states, "Victim: Teresa and Eliho Bashian, restitution is a joint and several liability with co-defendant."

The California Supreme Court has held: "[T]he abstract of judgment is not itself the judgment of conviction, and cannot prevail over the court's oral pronouncement of

judgment to the extent the two conflict. [Citations.]" (*People v. Delgado* (2008) 43 Cal.4th 1059, 1070; see also §§ 1213, 1213.5, *People v. Mitchell* (2001) 26 Cal.4th 181, 185; *People v. Mesa* (1975) 14 Cal.3d 466, 471; *People v. Walz* (2008) 160 Cal.App.4th 1364, 1367.) California Rules of Court, rule 8.155(c)(1) provides in pertinent part, "[O]n its own motion, the reviewing court may order correction . . . of any part of the record." (See also *People v. Mitchell, supra,* 26 Cal.4th at pp. 185-188; *People v. Boyde* (1988) 46 Cal.3d 212, 256.) The abstracts of judgment for both defendants are to be corrected to reflect their joint and several liability pursuant to section 1202.4, subdivision (f) of $2,491 to be paid to the Bashians and $5,000 to the State Victims' Compensation Board. Payment is to be made to the Bashians first.

3. Hector was properly sentenced to a consecutive 25-year-to-life sentence pursuant to section 12022.53, subdivisions (d) and (e)

Hector argues that the trial court improperly utilized the same facts in imposing sentence and imposing consecutive terms for the enhancements. Hector further argues the sentence violated section 654, subdivision (a). We disagree. The trial court properly sentenced Hector to 25 years to life for the first degree murder plus a mandatory consecutive term of 25 years to life for the section 12022.53, subdivisions (d) and (e) enhancement. (*People v. Palacios* (2007) 41 Cal.4th 720, 732-733; *People v. Hutchins* (2001) 90 Cal.App.4th 1308, 1313-1314; accord *People v. Sanders* (2003) 111 Cal.App.4th 1371, 1375.) The trial court also properly imposed and stayed 10-year terms on the section 12022.53, subdivisions (b) and (c) enhancements pursuant to section 12022.53, subdivisions (f) and (h). (*People v. Gonzalez* (2008) 43 Cal.4th 1118, 1123-1130; Cal. Rules of Court, rule 4.447.)

4. Court security fees

The Attorney General argues the trial court should have imposed a $20 section 1465.8, subdivision (a)(1) court security fee as to each of the two counts for which Luis was convicted. We agree. (See *People v. Crittle* (2007) 154 Cal.App.4th 368, 371; *People v. Schoeb* (2005) 132 Cal.App.4th 861, 865-866.) The trial court imposed one court security fee. One additional section 1465.8, subdivision (a)(1) fee shall be imposed as to Luis. The trial court is to personally insure the abstract of judgment is corrected to fully comport with the modifications we have ordered. (*People v. Acosta* (2002) 29 Cal.4th 105, 110, fn. 2; *People v. Chan* (2005) 128 Cal.App.4th 408, 425-426.)

IV. DISPOSITION

The judgment is modified to add one additional section 1465.8, subdivision (a)(1) fee as to Luis Romero and the abstract of judgment modified to correctly state the trial court's oral order specifiying the extent of defendants' joint and several liability for restitution. The judgment is affirmed in all other respects.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

TURNER, P. J.

We concur:

ARMSTRONG, J.

MOSK, J.